Supreme Court, U.S.
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No. 06-1113

In The
Supreme Court of the United States

THOMAS R. BUCHANAN,

Petitioner,

v.

UNITED PARCEL SERVICE, INC., and LOCAL 41 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

BRIAN K. O'BLENESS
Counsel of Record
STINSON MORRISON HECKER LLP
1201 Walnut, Suite 2800
Kansas City, Missouri 64106
(816) 842-8600

MARK D. HINDERKS
STINSON MORRISON HECKER LLP
12 Corporate Woods
10975 Benson, Suite 550
Overland Park, Kansas 66210
(913) 451-8600

Attorneys for Petitioner

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether Fed. R. Civ. P. 11, on a court's own motion for sanctions, requires notice and opportunity to respond concerning specific conduct for which sanctions are threatened.

2. Whether the imposition of sanctions under Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 for unspecified portions of a brief, for which notice and opportunity to respond was not provided, response was limited and no hearing was held, offends due process.

3. Whether Fed. R. Civ. P., on the court's own motion for sanctions, and 28 U.S.C. § 1927, require written findings that identify the specific acts for which counsel is sanctioned.

4. Whether the imposition of sanctions pursuant to section 1927 requires factual findings supporting a determination of subjective bad faith in order to establish "vexatious" conduct.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas R. Buchanan ("Buchanan") prays that the Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Clark v. United Parcel Service, Inc.*, No. 05-3215, 460 F.3d 1004 (8th Cir. Aug. 22, 2006), *reh'g and reh'g en banc denied* (8th Cir. Nov. 9, 2006), concerning the notice, opportunity to be heard, and findings required when a district court issues sanctions *sua sponte pursuant to* Fed. R. Civ. P. 11, and pursuant to 28 U.S.C. § 1927.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, App. 1-11) is reported at 460 F.3d 1004. The orders of the district court (App., *infra*, App. 12-19 and App. 20-26) are unreported. The show cause order of the district court (App., *infra*, App. 27-28) is unreported.

STATEMENT OF JURISDICTION

The court of appeals order was entered on August 22, 2006. Timely petitions for rehearing and rehearing en banc were denied on November 9, 2006 (App., *infra*, App. 29). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Federal Rule of Civil Procedure 11 is reproduced at App., *infra*, App. 30-32.

28 U.S.C. § 1927 is reproduced at App., *infra*, App. 33.

STATEMENT

Introduction.

Thomas R. Buchanan was sanctioned by the district court, under Rule 11 (*sua sponte*) and 28 U.S.C. § 1927 (on defendants' later motions) in connection with a brief in opposition to summary judgment filed on behalf of his clients in an underlying employment and labor case. The Eighth Circuit affirmed the sanctions and Mr. Buchanan seeks a writ of certiorari to review the decision.

Mr. Buchanan has practiced law for 25 years, and has never been sanctioned or disciplined in any court or tribunal, nor has any client that he has represented been sanctioned as a result of his representation. B-AP1947. Mr. Buchanan has been active in professional activities relating to professionalism and ethics, including accepting responsibility from the American Inn of Court Foundation in 1991 to establish what became the Earl E. O'Connor American Inn of Court, on which he served as its first President who was not a sitting judge. *Id.*, B-AP1948. He was nominated by a Justice of the Kansas Supreme Court for a national award given by the American Inn of Court Foundation to a person who demonstrates distinguished and exceptional leadership "in enhancing the excellence, professionalism, civility and ethics of the profession." *Id.* B-AP1948-49. He is a former President of the Johnson

County, Kansas Bar Association, and a former member of the Civil Bench-Bar Committee for the U.S. District Court for the District of Kansas. He served as Chairman and member for approximately twelve years on the Johnson County Judicial Evaluation Committee, the committee that conducts the evaluations of the state district judges in the Tenth Judicial District of Kansas. B-AP1949.

The District Court Case.

In the underlying employment case, defendants United Parcel Service, Inc. ("UPS") and Local 41 of the International Brotherhood of Teamsters ("Local 41") filed three separate, lengthy summary judgment briefs, spanning 267 pages and 577 fact contentions. B-AP1388-1654. With leave to exceed page limits otherwise applicable (B-AP1655-57), the two plaintiffs (represented by Mr. Buchanan and others from his firm) filed a joint consolidated opposition brief of 480 pages, which included the space necessary to repeat all of defendants' contentions in order to respond to them, as well as plaintiffs' own lengthy statement of additional facts. B-AP16-502 (R. Doc. 373).

Defendants each filed reply briefs in support of summary judgment. B-AP503-1107. Ultimately, in comparison to plaintiffs' consolidated briefing of 480 pages, defendants' total briefing on summary judgment consisted of 837 pages. *Compare* B-AP16-502 *with* B-AP1388-1654 *and* B-AP503-1107. Excluding those portions of defendants' briefs that responded to plaintiffs' statement of additional facts, defendants' briefs still would have been 450 pages long. *Id.*

Local 41 did not controvert in any respect 494 of plaintiffs' additional facts for purposes of summary judgment and controverted others only in part. B-AP503-705.

UPS joined and incorporated Local 41's reply into its own reply, B-AP805, and identified other facts as uncontroverted or controverted only in part. B-AP718.

On April 7, 2005, without any notice, warning, or hearing, and without identifying any "legal misstatements" (B-AP17-98), the district court struck *all* of plaintiffs' factual contentions and oppositions, including hundreds of factual contentions (more than half) that had not been controverted by one or more defendants for purposes of summary judgment. (R. Doc. 506). Having struck all of plaintiffs' factual contentions and oppositions, the district court then granted summary judgment in favor of defendants on all claims. *Id.*

The Order to Show Cause.

On the same date, the district court *sua sponte* issued an Order to Show Cause to Mr. Buchanan, directing him to explain why sanctions should not be imposed under Fed. R. Civ. P. 11. App. 27. In that Order, the district court cross-referenced its summary judgment orders and identified and relied upon as "examples" six specific paragraphs of the factual statements which it believed to misstate the record, improperly controvert a referenced fact or to be unsupported statements. *Id.*

The district court pointedly limited Mr. Buchanan's response to the Order to Show Cause to ten pages double-spaced and required it to be filed within fifteen days. *Id.*, App. 28.

Mr. Buchanan immediately secured counsel, and within the allotted fifteen days and ten pages responded to the six examples as to which he had been given notice by

the Court (noting for example, that two of the example statements were not materially controverted by one of the defendants and another involved an obvious name error that one of the defendants correctly noted as an obvious error). B-AP1189-1198. Mr. Buchanan also requested that if the district court intended to issue sanctions based upon other portions of the brief, that he be given notice and opportunity to respond to them. B-AP1191, n.5.

The Section 1927 Motions.

Shortly after the district court's Order to Show Cause, both defendants filed motions for attorneys' fees under 28 U.S.C. § 1927. B-AP1108-1188. Local 41's motion relied only on the conduct that the district court had already referenced in its Order to Show Cause and summary judgment rulings, except that it referenced in passing, in a single sentence, certain additional pages of unspecified instances of alleged "misleading advocacy." B-AP1114. Mr. Buchanan responded to Local 41's motion; and even though no specifics had been set forth concerning the items mentioned in passing (a majority of which had not been controverted by Local 41 in its reply), he explained the evidentiary support for each. B-AP1205-1209. As a result, Local 41's reply brief on the section 1927 motion made no contention that Mr. Buchanan's explanations of any of these items were insufficient or incorrect. *See* B-AP1256-1263. It simply did not address any of the specific parts of plaintiffs' brief that it had identified as sanctionable. *Id.*

UPS' section 1927 motion also relied upon the district court's "examples" and then cited five additional specific paragraphs. *See* B-AP1132-1188. Again, Mr. Buchanan

explained why each of UPS' contentions were incorrect. B-AP1217-1228. Ironically, Mr. Buchanan established that UPS had itself misrepresented the record in the brief in which it was seeking section 1927 sanctions. B-AP1219. As a result, UPS' reply brief in support of its section 1927 motion did not address or make any response to Mr. Buchanan's explanation. Likewise, UPS did not claim that any of Mr. Buchanan's explanations were incorrect or insufficient. B-AP1264-1276.

Again, Mr. Buchanan requested notice and opportunity for hearing concerning any other matters which the district court might consider in issuing sanctions. B-AP1217, n.5. Neither the district court nor the defendants identified any additional specific conduct as potentially sanctionable.

The District Court Sanction Orders.

On July 19, 2005, the district court entered Orders granting Rule 11 and 28 U.S.C. § 1927 sanctions against Mr. Buchanan. App. 12-19; App. 20-26. The district court made no findings that any specific paragraph of the brief in question was unsupported or constituted a misrepresentation or misstatement subject to sanction. In the Rule 11 Order, the district court did not discuss or make findings concerning Mr. Buchanan's explanations about the six examples referenced in the Order to Show Cause. The district court acknowledged that "sua sponte sanctions require that notice be given of the specific conduct that appears to violate Rule 11," but, relying upon *Lupo v. R. Rowland & Co.*, 857 F.2d 482, 485 (8th Cir. 1988), stated that its notice had been sufficient in specifying the conduct as "the very nature and tenor of the Document 373 as a

whole," without designating the particular statements relied upon as sanctionable. App. 16. In the order concerning 28 U.S.C. § 1927 sanctions, the district court similarly made no findings concerning any specific statements in the brief that it relied upon as sanctionable. It merely cross-referenced its findings in the Rule 11 Order. *Id.* at App. 20.

The Court of Appeals Decision.

The Eighth Circuit's decision affirmed both sanctions orders. *Clark v. United Parcel Serv., Inc.*, 460 F.3d 1004, 1007 (8th Cir. 2006). It noted that *sua sponte* Rule 11 sanctions require that the court first issue an order "describing the specific conduct that appears to violate Rule 11(b)" and then, when imposing sanctions, the court must "describe the conduct determined to constitute a violation of Rule 11." *Id.* at 1008. However, the Eighth Circuit found the notice given to be adequate, noting that six examples had been given by the district court, and then noting that the Eighth Circuit was able to identify in the brief other examples (that were not identified by the district court or addressed by Mr. Buchanan in his response, and which Mr. Buchanan never had an opportunity to address) of the same types of statements. *Id.* at 1008-09.

In holding that generalized notice and opportunity to be heard was sufficient, the Eighth Circuit did not address the implications of the fact that Mr. Buchanan was given only fifteen days and ten double-spaced pages in which to try to identify and respond to the yet-unidentified sanctionable statements that may ultimately have been relied upon by the district court. Concerning notice and opportunity to respond in connection with the 28 U.S.C. § 1927

sanctions, the Eighth Circuit concluded simply that the motions filed by UPS and Local 41 "put Buchanan on notice of the asserted deficiencies in the pleading that he needed to address with respect to § 1927." *Id.* at 1011.

The Eighth Circuit did not identify any specific statements upon which sanctions were based that the district court actually found to have violated the standards of either Rule 11 or section 1927, or find that the district court had actually made any such findings.

REASONS FOR GRANTING THE PETITION

Mr. Buchanan respectfully submits that the Eighth Circuit's decision undermines the proper construction of Rule 11, as amended in 1993, and erodes the due process protections embodied in Rule 11 (as amended) and that are required for imposition of sanctions under either Rule 11 or 28 U.S.C. § 1927. In addition, the Eighth Circuit's decision conflicts with decisions of other Circuit Courts of Appeals.

Mr. Buchanan petitions the Court for a writ of certiorari to consider the parameters of notice, opportunity to be heard, findings, and due process required by Rule 11 and 28 U.S.C. § 1927 prior to issuing sanctions against counsel. The requirements must be defined in such a way that lawyers threatened with sanctions have a real and fair opportunity to respond to all of the allegations lodged against them, and so that the resulting findings reflect a clear record of the conduct sanctioned for purposes of appellate review. In addition, the requirements should be consistent from court to court. Because of the importance of the issues raised concerning the standards for sanctioning counsel and the

serious professional stigma associated with sanctions, it is vital that the questions presented be decided by the Court.

I. The District Court's Failure To Provide, And The Eighth Circuit's Refusal To Require, Notice Of Specific Conduct Subject To Sanction Is Inconsistent With Rule 11(c)(1)(b) And Created An Invisible And Moving Target, Denying Mr. Buchanan A Fair Opportunity To Respond, And Conflicts With Decisions Of Other Circuits.

Mr. Buchanan was given notice of six examples in the Order to Show Cause from the district court. He responded, offering explanations concerning why those cited paragraphs were not sanctionable. The district court did not reject any of those explanations, or find that any of those paragraphs were the basis for sanctions ultimately imposed. Instead, the district court relied on the Eighth Circuit's 1988 *Lupo* decision – which pre-dated the amended notice requirements relating to *sua sponte* sanctions added to the Rule in 1993 – to hold that it did not need to provide notice more specific than to identify the whole of the brief itself. Although the Eighth Circuit did not discuss the district court's reliance on *Lupo*, it agreed that identification of the brief as a whole, and the general nature of the conduct, was sufficient notice without identifying specific statements for which sanctions would issue. *Clark*, 460 F.3d at 1009.

The Eighth Circuit's rationale was that Mr. Buchanan was told that there were misrepresentations and unsupported statements, so therefore he could have searched out all such matters in the brief and responded accordingly. Mr. Buchanan respectfully submits that this rationale is inconsistent with the Rule's requirement that "specific

conduct" be described. In responding to a Show Cause Order, the attorney should not be required to guess which and how many of several hundred statements in a brief the attorney should address because the court believes them to be sanctionable.

Decisions of other Circuit Courts of Appeal conflict with the Eighth Circuit's decision below on the specificity of notice required. *See Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 389 (2d Cir. 2003) (sanctions order reversed in part because sanctioned party was not given notice of which fact contentions or denials allegedly lacked evidentiary support); *Martens v. Thomann*, 273 F.3d 159, 178-79 (2d Cir. 2001) (applying Rule 11, district court must identify the specific allegations of a motion that purportedly lack evidentiary support); *Hutchinson v. Pfeil*, 208 F.3d 1180, 1184 (10th Cir. 2000) ("[Rule 11 provisions] prescribe a procedure to be followed when the district court imposes [*sua sponte* sanctions]: issuance of a show cause order specifically describing the conduct implicating the rule, followed by a reasonable opportunity for the party/attorney so advised to demonstrate how she has not violated the rule."); *Thornton v. General Motors Corp.*, 136 F.3d 450, 454 (5th Cir. 1998) (reversing sanctions order when "show cause order cited [counsel] for his general conduct in failing to produce evidence in support of [plaintiff's] claim [in opposition to summary judgment]"); *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147, 151 (7th Cir. 1996) (Rule 11(c)(1)(B) formality for *sua sponte* sanction is intended to ensure due process; district court's after-the-fact Rule 59(e) review of sanctions already imposed held insufficient).

Mr. Buchanan respectfully submits that Rule 11's post-1993 requirement for an order "describing the specific

conduct," when applied to allegations that statements were misrepresented or unsupported, should, at a minimum, require identification of *which* statements are in question, so that fair and effective opportunity to respond exists. Anything less reads "specific conduct" out of the Rule.

Furthermore, this case illustrates the problem with anything less. As to every statement that was identified to him (albeit as "examples"), Mr. Buchanan provided non-sanctionable explanations, which were not rejected. How can the court determine, without giving him a chance to address other statements believed to be sanctionable, that Mr. Buchanan would be unable to offer similar non-sanctionable explanations?

Mr. Buchanan's opportunity to explain his questioned conduct was limited, and in the context of the findings ultimately issued, illusory. The district court failed to make specific findings describing the conduct determined to be sanctionable and explaining the bases for sanctioning that conduct, in violation of Rule 11(c)(3) and section 1927. *See Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 718-19 (8th Cir. 1999). In combination with the notice issue, this initially created an invisible and moving target for Mr. Buchanan to address (which could never have been addressed in the broad manner in which the district court ultimately characterized its notice, given the limited opportunity provided), and now creates an invisible target for appellate review.

II. The Imposition Of Sanctions Under Rule 11 And 28 U.S.C. § 1927 For Unspecified Portions Of A Brief, For Which Notice And Opportunity To Respond Was Not Provided, Response Was Limited And No Hearing Was Held, Offends Due Process.

Even now, after the sanctions against Mr. Buchanan have been affirmed by the Eighth Circuit, it is impossible to determine from the opinions of the district court or the Eighth Circuit exactly which, if any, statements in the target brief were found to violate Rule 11 or to offend 28 U.S.C. § 1927. It necessarily follows that, during the district court's sanctions proceedings, Mr. Buchanan did not have the fair notice and opportunity to respond that due process of law requires. Other than the six examples cited in the Rule 11 Order to Show Cause (which he did address, to the point that no findings were ever made about them), and the handful of other items originally relied upon by defendants in their section 1927 motions (also addressed to the point that no findings were made about them), he was left to guess at which other statements he should respond to, support or explain. Furthermore, as to the Rule 11 motion, his task was rendered impossible by the district court's limitation of his response to the Order to Show Cause to ten pages double-spaced. He could not have responded to more than the six paragraphs cited by the district court, even if they had been properly identified.

When, as here, a notice sets out only examples and generalized conduct, coupled with the limitations on his response (ten pages, double-spaced, within fifteen days), an attorney facing sanctions does not have a fair opportunity to respond. In addition, the ten pages double-spaced

requirement is far less space than permitted for routine motions, much less to respond to the district court's *sua sponte* motion for sanctions. And here, the underlying case involved an enormous record, including nearly 50 depositions comprising thousands of pages of testimony and tens of thousands of pages of documents produced by the parties.

Meanwhile, the backdrop to the sanctions motion was that the district court had already razed the plaintiffs' claims by striking all of their factual contentions and oppositions and entering summary judgment for defendants on all counts. Thus, by the time it considered the sanctions motions, the district court was locked in. Any acknowledgement that Mr. Buchanan's conduct was not sanctionable under Rule 11 would have been *de facto* acknowledgement that the orders striking plaintiffs' entire factual response (which had already become final) were flawed. The district court failed to give Mr. Buchanan the "fair notice and an opportunity to be heard" that due process requires.

Further, Mr. Buchanan submits that the Eighth Circuit erred in concluding that he had been given adequate notice and opportunity to be heard concerning 28 U.S.C. § 1927 sanctions, when the district court did not base its sanctions on items relied upon by the movants (to which Mr. Buchanan responded with explanation) but on undesignated matters to which he did not and could not fairly respond. Even now, it is not possible to ascertain which portions of the offending brief that the district court actually relied upon, if any, are sanctionable. (The Eighth Circuit attempted to supply its own findings concerning particular paragraphs.) It follows that Mr. Buchanan did

not have adequate notice and opportunity to respond concerning the bases for the sanctions against him.

The Eighth Circuit has held that before any sanctions are issued, the attorney must be given "fair notice or an opportunity to be heard." *See, e.g., Fuqua Homes, Inc. v. Beattie*, 388 F.3d 618, 623 (8th Cir. 2004). The *Fuqua* court noted the due process component of this requirement: "The Supreme Court has said that '[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record,' and has indicated that the denial of these procedural safeguards has due process implications." *Id.* (*quoting Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 & n.14, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)). *See also Coonts v. Potts*, 316 F.3d 745, 753 (8th Cir. 2003) (under due process, sanctioned party must have "real and full opportunity to explain its questionable conduct before sanctions are imposed").

Mr. Buchanan submits that identification of the overall brief as containing (somewhere within it) unspecified actionable statements is not sufficient due process. This is illustrated by argument presented by the opposing parties in this case. In briefing before the Eighth Circuit, Appellees (now Respondents) contended (as the Eighth Circuit ultimately concluded) that the fair notice and opportunity to be heard requirement of due process was satisfied by the district court's reference to the briefing as a whole in lieu of specific statements. Thus, they argued, identification of specific sanctionable items would likely have taken the district court more than "a hundred pages," and is a burden "so unreasonable" that it would be an "onerous burden" on the district court. (Local 41 Brief at 18; UPS Brief at 56). If that is true, as contended by Respondents, then Mr.

Buchanan could not have had "fair notice and opportunity to be heard" when he was given only 15 days and ten double-spaced pages to *identify and address* the same unspecified items in a lengthy brief that Respondents claimed would have been unreasonable for the district court just to *identify* in any time or length of paper.

III. The Eighth Circuit's Holding Regarding Findings Sufficient To Support Sanctions Thwarts Meaningful Appellate Review And Is Inconsistent With Rule 11(c)(3).

The 1993 amendments to Rule 11 added the findings requirement of Rule 11(c)(3). "When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed." Thus, Rule 11(c)(3) now requires that "a reasoned basis for the sanction must be articulated in order 'to make appellate review meaningful.'" Georgene M. Vairo, ABA Center for Professional Responsibility and Tort Trial and Insurance Practice Section, *Rule 11 Sanctions* 448 (3d ed. 2004) (*quoting Warren v. Guelker*, 29 F.3d 1386, 1390 (9th Cir. 1994)). Likewise, section 1927 requires specific findings describing the conduct determined to be sanctionable and explaining the bases for sanctioning that conduct. *Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 718-19 (8th Cir. 1999) (relying on cases from the Third, Fifth, Seventh and Tenth Circuits).

The Eighth Circuit's implicit construction of this requirement severely undermines appellate review of Rule 11 sanctions. An appellate court cannot determine if a district court's findings of fact concerning particular statements are erroneous if, as here, it cannot determine which, if any, specific statements within the subject papers

were actually found to be unsupported or to constitute misstatements or mischaracterizations.

Mr. Buchanan was sanctioned by the district court for including in a brief, statements said to be unsupported or to constitute misrepresentations or misstatements. Yet, even now, following the Eighth Circuit's decision, it is not possible to determine exactly which statements in the brief the district court found offended these standards because specific findings were never made.

IV. Disagreement Among The Circuits Should Be Resolved To Hold That 28 U.S.C. Section 1927 Requires Sufficient Findings Of Subjective Bad Faith To Establish "Vexatious" Conduct.

There is a split in the Circuit Courts regarding whether imposition of sanctions under section 1927 requires a finding of subjective bad faith to establish that there has been an "unreasonable and vexatious" multiplication of litigation. *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983) ("the district court had the power to sanction counsel for filing a frivolous appeal in bad faith"); *see NAACP v. Atkins*, 908 F.2d 336, 340 (8th Cir. 1990) (noting that "the language of § 1927 appears to require both a finding of objectively unreasonable behavior and a finding of bad faith."); *see also* Vairo, *Rule 11 Sanctions* 760 (discussing the Circuit split). Other courts do not require such a showing.

There is no evidence in this case that Mr. Buchanan had subjective bad faith – the only evidence concerning subjective intent was the declaration that the entire team of lawyers who prepared the brief (including Mr. Buchanan) signed it, declaring that they filed the brief in good faith as reasonable advocacy with no intention to multiply or delay

the proceedings. B-AP1198; B-AP1214. The district court did not find these declarations to be false or not credible. Nor did it make any findings concerning specific parts of the brief that would support an inferential finding of subjective bad faith. The district court's only conclusions about bad faith or its equivalent are just that – conclusions, not based upon any factual findings. The Eighth Circuit in turn held that the district court's general description of Mr. Buchanan's conduct "amounted" to bad faith (App. 10). Petitioner submits that section 1927's requirement of "vexatious" conduct should be held to require the existence of subjective bad faith, supported by adequate factual findings (not mere conclusions), not present in the record of this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRIAN K. O'BLENESS
Counsel of Record
STINSON MORRISON HECKER LLP
1201 Walnut, Suite 2800
Kansas City, Missouri 64106
(816) 842-8600

MARK D. HINDERKS
STINSON MORRISON HECKER LLP
12 Corporate Woods
10975 Benson, Suite 550
Overland Park, Kansas 66210
(913) 451-8600

Attorneys for Petitioner

February 2007

460 F.3d 1004

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-3215

Stephen E. Jones; Doyle Clark, Plaintiffs,	*	
Thomas R. Buchanan, Appellant,	*	Appeal from the United States District Court for the Western District of Missouri.
v.	*	
United Parcel Service, Inc.; Local 41 of the International Brotherhood of Teamsters, Appellees.	*	

Submitted: March 13, 2006
Filed: August 22, 2006

Before COLLOTON, HEANEY, and GRUENDER, Circuit Judges.

COLLOTON, Circuit Judge.

Attorney Thomas Buchanan appeals an order sanctioning him $1,000 pursuant to Rule 11 of the Federal Rules of Civil Procedure, and an order requiring him to

reimburse attorneys' fees of $10,000 to United Parcel Service ("UPS") and $10,000 to Local 41 of the International Brotherhood of Teamsters ("Local 41"), pursuant to 28 U.S.C. § 1927. We affirm.

Buchanan represented Stephen Jones and Doyle Clark in their action against UPS and Local 41 for wrongful termination and inadequate union representation. UPS and Local 41 moved for summary judgment on all counts raised by Jones and Clark, and in response, plaintiffs, through Buchanan, filed a 480-page pleading, which included a 168-page statement of controverted facts, a 179-page response to defendants' statements of uncontroverted facts, and a 132-page argument section. The district court* determined that plaintiffs' pleading violated Local Rule 56.1, disregarded all of plaintiffs' statement of controverted facts, and deemed defendants' statements of uncontroverted facts admitted. *See* W.D. Mo. R. 56.1(a). The court then granted summary judgment for the defendants on all counts. In an opinion filed today, we conclude that the district court did not abuse its discretion in finding a violation of the local rule or in disregarding the noncompliant pleading. *Jones v. UPS, Inc.*, Nos. 05-2202, 05-2205, slip op. at 8-11 (8th Cir. Aug. 22, 2006).

The district court, pursuant to Federal Rule of Civil Procedure 11(c)(1)(B), ordered Buchanan to show cause why he should not be sanctioned, and UPS and Local 41 moved for reimbursement of attorneys' fees pursuant to 28 U.S.C. § 1927. Buchanan's response to the show cause order focused on six specific paragraphs of the plaintiffs'

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* The Honorable Gary A. Fenner, United States District Judge for the Western District of Missouri.

pleading, which the district court had cited as examples of what it described as "misrepresentations and misstatements," or attempts at controversion that were either "unsupported by record or blatantly non-responsive." He requested that if the court intended to base sanctions on "other specific items," then he should have "an adequate opportunity to respond with explanation."

The court's order imposing sanctions addressed Buchanan's statements about notice and opportunity to respond. The court explained that its intention in offering six examples of deficient paragraphs in the pleading was "to provide an outline of the objectionable conduct contained in Document 373 as a whole and not to supply an exclusive list of sanctionable actions." The court reasoned that although Rule 11(c)(1)(B), which permits a court to impose sanctions on its own initiative, requires the court to provide adequate notice prior to levying sanctions, this requirement did not place a burden on the court to enumerate "each and every transgression contained within 480 pages" of the pleading. The court believed that sufficient notice was provided to Buchanan in the order to show cause and the orders granting summary judgment, which were incorporated by reference into the order to show cause.

In explaining its decision to impose sanctions, the court determined that "the length of the document, 480 pages and 948 paragraphs of Fact Statement, when coupled with numerous misstatements and mischaracterizations of the record becomes unduly burdensome." Among other things, "the oppressive size combined with the overall untrustworthy nature of the document had a cumulative effect which [the] Court found to be repugnant to the very concept of judicial economy." The court also

found that Buchanan's attempt to justify the length of plaintiffs' brief by comparing it to the combined length of defendants' three summary judgment motions and two reply briefs was "disingenuous," "ill-conceived," and "irrelevant," because two-thirds of the defendants' pages were devoted to responding to Buchanan's pleading.

Buchanan also responded to defendants' motions for attorneys' fees, interpreting 28 U.S.C. § 1927 to require a finding of both objective unreasonableness and subjective bad faith. He argued that neither UPS nor Local 41 made the requisite showing. In ordering Buchanan to pay fees, the court was unconvinced that the statute requires a showing of subjective bad faith, but found that if it did, then Buchanan's conduct "would easily satisfy a subjective, bad-faith component." The court found that portions of the 480-page pleading "were created for the sole purpose of causing unnecessary delay and a needless increase in the cost of litigation."

In his appeal of the Rule 11 sanction, Buchanan argues that the court did not provide the notice required by Rule 11(c)(1)(B). He further contends that the asserted deficiencies in Document 373 discussed by the court in its order did not violate Rule 11(b), and did not meet the standards for conduct that may be sanctioned under the rule. Buchanan also argues that if there was a proper finding of sanctionable conduct, then the sanction imposed exceeded an amount that was "sufficient to deter repetition of such conduct." *See* Fed. R. Civ. P. 11(c)(2).

We review the district court's determinations concerning Rule 11 under the abuse-of-discretion standard. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Rule 11 sanctions may be warranted when a pleading is "presented

for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," Fed. R. Civ. P. 11(b)(1), contains allegations or factual contentions that lack evidentiary support, Fed. R. Civ. P. 11(b)(3), or contains denials of factual contentions that are not warranted on the evidence. Fed. R. Civ. P. 11(b)(4).

Rule 11 provides a specific procedure to be followed when sanctions are considered. A district court may impose Rule 11 sanctions on its own initiative, but it must first enter an order describing the specific conduct that appears to violate Rule 11(b), and direct the attorney to show cause why he has not violated the rule. Fed. R. Civ. P. 11(c)(1)(B); *see also Fuqua Homes, Inc. v. Beattie,* 388 F.3d 618, 623 (8th Cir. 2004). Then, when imposing sanctions, the court is required to describe the conduct determined to constitute a violation of Rule 11, and explain the basis for the sanction chosen. Fed. R. Civ. P. 11(c)(3).

We are not persuaded by Buchanan's argument that the district court failed to give adequate notice of the specific conduct that appeared to violate Rule 11. The court entered an order to show cause in accordance with Rule 11(c)(1)(B), and the order incorporated by reference the orders granting summary judgment, which detailed the court's objections to Document 373. There is no dispute that the court thereby notified him of six specific paragraphs in the pleading that the court viewed as deficient and exemplary of widespread flaws in the document. The response filed by Buchanan and his law firm to the court's order to show cause acknowledged that upon re-review of Document 373, counsel himself found additional errors in the citation of facts. (R. Doc. 518 at 3 n.5).

The court in its orders granting summary judgment also pointed to other "specific conduct" that it found objectionable. The court referred to "instances in which [plaintiffs] attempt to dispute paragraphs which are supported by testimony from their own depositions." (R. Doc. 506 at 5). Although the court did not cite specific paragraph numbers beyond one prominent example, a review of the defendants' pleadings should readily have revealed to Buchanan other asserted uncontroverted facts that are supported by testimony from the depositions of Jones and Clark. (*E.g.*, R. Doc. 373, Pls.' Resp. to Local 41's Statement of Uncontroverted Facts, ¶¶ 8, 91, 105, 106, Pls.' Resp. to UPS's (Clark) Statement of Uncontroverted Facts, ¶¶ 39, 46, 101, Pls.' Resp. to UPS's (Jones) Statement of Uncontroverted Facts, ¶¶ 77, 120).

The district court further observed that plaintiffs' responses "frequently engage in argument in opposition to Defendants' facts without directing the Court to any portion of the record for support." (R. Doc. 506 at 6). The court gave one example, but other instances again are readily identifiable on a review of Document 373. (*E.g.*, R. Doc. 373, Pls.' Resp. to Local 41's Statement of Uncontroverted Facts, ¶¶ 119, 121, Pls.' Resp. to UPS's (Clark) Statement of Uncontroverted Facts, ¶ 23, Pls.' Resp. to UPS's (Jones) Statement of Uncontroverted Facts, ¶¶ 34, 41, 43, 51, 71, 88). The absence of a listing of all offending paragraphs did not deprive Buchanan of adequate notice that he should explain why many responses to the statements of uncontroverted fact include no citation of the record as required by Local Rule 56.1.

Similarly, the court cited the circumstance that "many of Plaintiffs' attempts to controvert facts do not specifically refer to the portions of the record, but merely contain

cross-references to other paragraphs, which oftentimes have no support." (R. Doc. 506 at 6). Again, while the court provided one example, numerous examples of this cross-referencing technique can be readily identified on review of Document 373. (*E.g.*, R. Doc. 373, Pls.' Resp. to Local 41's Statement of Uncontroverted Facts, ¶¶ 23, 31, Pls.' Resp. to UPS's (Clark) Statement of Uncontroverted Facts, ¶¶ 27, 35, 40, 48, 49, 100, 102, 103, 107, Pls.' Resp. to UPS's (Jones) Statement of Uncontroverted Facts, ¶¶ 35, 37, 121-23, 163). The district court's reference to the tactic gave notice of the "specific conduct" at issue.

The district court also expressed concern that the document was "unwieldy," "gargantuan," "titanic," and "utterly oppressive by means of its sheer size," (R. Doc. 506 at 2-3), particularly in view of the requirement of Local Rule 56.1 that the opposition to a motion for summary judgment begin with a "concise listing of material facts." (*Id.* at 5); W.D. Mo. R. 56.1(a). While this notice is not directed to specific paragraphs of the pleading, it is still a description of "specific conduct" that the court found objectionable. Buchanan was properly notified that he should address why his "concise listing of material facts" spanned 948 paragraphs, and why a 480-page pleading was justified under the circumstances.

As for the substantive decision that Buchanan's conduct was sanctionable, we said in 1990 that the standard under Rule 11 is whether the attorney's conduct, "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Perkins v. Spivey,* 911 F.2d 22, 36 (8th Cir. 1990). Rule 11 was amended in 1993, and Buchanan argues that the amended rule requires a finding that the attorney's conduct was "akin to contempt of court" and motivated by subjective

bad faith before a court may impose sanctions on its own initiative. This argument draws on commentary of the advisory committee on the rules of civil procedure, which states that "[s]ince show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide for a 'safe harbor' to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative." Fed. R. Civ. P. 11 advisory committee's note (discussing 1993 amendments to subdivisions (b) and (c)). Buchanan's argument on the governing legal standard was accepted by a divided panel of the Second Circuit. *Compare In re Pennie & Edmonds LLP,* 323 F.3d 86, 90 (2d Cir. 2003), *with id.* at 94-101 (Underhill, J., dissenting).

We have said after the amendment of Rule 11 that the rule should be applied with "particular strictness" when sanctions are imposed on the court's own initiative, *MHC Inv. Co. v. Racom Corp.,* 323 F.3d 620, 623 (8th Cir. 2003), but we have found it unnecessary to decide whether the standard for sanctions initiated under Rule 11(c)(1)(B) is different from, and more stringent than, the standard for sanctions initiated by motion of a party under Rule 11(c)(1)(A). *Norsyn, Inc. v. Desai,* 351 F.3d 825, 831 (8th Cir. 2003). We find it unnecessary to resolve that issue in this case as well, because assuming that Rule 11 does require a finding of subjective bad faith to impose sanctions on a court's own initiative, the district court made such a finding here, and we conclude that the determination was neither clearly erroneous nor an abuse of discretion.

Determinations under Rule 11 often involve "fact-intensive, close calls," *Cooter & Gell,* 496 U.S. at 404 (internal quotation omitted), and "[w]e give '[d]eference to

the determination of courts on the front lines of litigation' because these courts are 'best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted.'" *MHC Inv. Co.,* 323 F.3d at 624 (quoting *Cooter & Gell,* 496 U.S. at 404). The Supreme Court adopted the deferential abuse-of-discretion standard of review for Rule 11 sanctions with the recognition that it would "streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court." *Cooter & Gell,* 496 U.S. at 404.

We conclude that the district court did not abuse its discretion in determining that Buchanan violated the objective unreasonableness standard of Rule 11. The court reasonably found that the length of Document 373, combined with unsupported attempts to controvert facts (including misstatements and mischaracterizations of the record), failures to provide citations to the record, improper use of cumbersome cross-references, and inappropriate inclusion of legal argument in a purported listing of disputed material facts, made the pleading unduly burdensome. *See generally Jones,* Nos. 05-2202, 05-2205, slip op. at 8-11. The record is sufficient to support the district court's conclusion that, when viewed objectively, Buchanan acted with reckless disregard of his duties to the court, and the court's order adequately explains the basis for this conclusion.

Regarding Buchanan's subjective motivation, the district court specifically found that portions of the pleading "were created *for the sole purpose* of causing unnecessary delay and a needless increase in the cost of litigation." (R. Doc. 534 at 5) (emphasis added). And the

court found that Document 373 represented "a form [of] litigation by attrition, wherein *the practitioner's intent* was to force the opposition either to yield to its position or be crushed under a great weight of misstated factual assertions and drowned in a sea of bombast." (*Id.*) (emphasis added). These are findings that attorney Buchanan acted with an improper purpose and intent, and they amount to a finding of subjective bad faith. Such a finding concerning an attorney's state of mind must necessarily be based on circumstantial evidence and inferences drawn therefrom. Having reviewed Document 373 in detail and in the context of the litigation, we believe the circumstances support the inference drawn by the district court, and the order adequately explains the basis for the findings of purpose and intent. The findings are neither clearly erroneous nor an abuse of discretion. We also conclude that a sanction of $1,000 is reasonable and consistent with the principle that a sanction be "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2). Accordingly, the district court did not abuse its discretion in imposing sanctions on Buchanan pursuant to Rule 11.

We also review for abuse of discretion the district court's order that Buchanan reimburse attorneys' fees incurred by UPS and Local 41. *Tenkku v. Normandy Bank,* 348 F.3d 737, 743-44 (8th Cir. 2003). A court may require counsel to satisfy personally attorneys' fees reasonably incurred by an opposing party when counsel's conduct "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927. Relying on *dicta* in *NAACP-Special Contribution Fund v. Atkins,* 908 F.2d 336, 340 (8th Cir. 1990), Buchanan argues that § 1927 has both

objective and subjective components. Our subsequent holdings make clear, however, that the statute permits sanctions when an attorney's conduct, "'viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.'" *Tenkku,* 348 F.3d at 743 (quoting *Perkins,* 911 F.2d at 36); *see also Lee v. First Lenders Ins. Servs., Inc.,* 236 F.3d 443, 445 (8th Cir. 2001). As with sanctions under Rule 11, the district court must provide an attorney with fair notice and an opportunity to be heard before ordering the reimbursement of fees. *Fuqua Homes,* 388 F.3d at 623.

We conclude that the motions filed by UPS and Local 41, which incorporated and expanded on the discussion in the court's orders granting summary judgment and the order to show cause, put Buchanan on notice of the asserted deficiencies in the pleading that he needed to address with respect to § 1927. The district court's reasons for disregarding the non-compliant pleading and imposing Rule 11 sanctions also support a finding that counsel "multiplie[d] the proceedings . . . unreasonably and vexatiously." 28 U.S.C. § 1927. The reimbursement of $10,000 to each defendant was nearly 80% less than the amount requested by UPS and 35% less than the amount requested by Local 41, and we believe it represents a measured determination that does not exceed the fees likely incurred as a result of the vexatious pleading. *See Lee,* 236 F.3d at 446. Accordingly, the district court's order to reimburse fees was not an abuse of discretion.

For these reasons, the orders of the district court are affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

STEPHEN E. JONES and DOYLE CLARK,	)	
Plaintiffs,	)	
vs.	)	**Case No. 03-0284-CV-W-GAF**
UNITED PARCEL SERVICE, INC., and LOCAL 41 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	)	
Defendants.	)	

ORDER

(Filed Jul. 19, 2005)

This Court has previously entered an order to show cause (Doc. 508) why sanctions should not be imposed upon Thomas R. Buchanan, counsel for Plaintiffs, as a penalty for the numerous and atrocious violations of Rule 11 of the Federal Rules of Civil Procedure relating to the authorship of Plaintiffs' Memoranda in Opposition to Defendants' Motions for Summary Judgment (Doc. 373). After affording Mr. Buchanan an opportunity to respond to the order to show cause, this Court finds for the following reasons that sanctions should be imposed.

The document that is the subject of these sanctions, Document 373, was filed on behalf of the plaintiffs, Doyle Clark ("Clark") and Stephen E. Jones ("Jones") (collectively as "Plaintiffs"), by Mr. Buchanan as suggestions in opposition to three separate motions for summary judgment submitted by the two defendants in this case, United

Parcel Service, Inc. ("UPS") and Local 41 of the International Brotherhood of Teamsters ("Local 41") (collectively as "Defendants"). Local 41 filed one motion (Doc. 310) and suggestions in support (Doc. 312) which were directed at the claims of both Plaintiffs. UPS filed two motions each with suggestions in support which were directed separately at the claims of Clark (Doc. 318 & 320) and Jones (Docs. 319 & 321). In opposition to these motions, Mr. Buchanan submitted Document 373, Plaintiffs' Memoranda in Opposition to Defendants' Motions for Summary Judgment, which totaled 480 pages. In ruling on the motions for summary judgment, this Court found that certain portions of Document 373, namely Plaintiffs' 948 paragraph Fact Statement and Responses to defendants' statements of uncontroverted fact, were noncompliant with the Local Rules of this Court and the Federal Rules of Civil Procedure. (Doc. 506 at p. 7). Additionally, this Court concluded that many factual assertions made in those portions of Document 373 contained misstatements, misrepresentations, and mischaracterizations of the evidence and the record. (Doc. 506 at pp. 2-7). After granting all three of the motions for summary judgment submitted by defendants UPS and Local 41, this Court ordered Mr. Buchanan to show cause why sanctions should not be imposed as a penalty for what this Court concluded were numerous and atrocious violations of Rule 11 of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure contemplate "the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Attorneys have the an obligation to the Court "to refrain from conduct that frustrates" those aims. Fed. R. Civ. P. 11, Advisory Committee Note to 1993 Amendments. As a result, Rule 11 of the Federal Rules of

Civil Procedure requires that by making a representation to the Court in the form of a "pleading, written motion, or other paper" an attorney is certifying that it "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11(b)(1). Moreover, the Rule provides that "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3). The Rule further states that denials of factual contentions must be "warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief" Fed. R. Civ. P. 11(b)(4).

The imposition of sanctions pursuant to Rule 11 rests squarely within the sound discretion of the district court. *MHC Investment Co. v. Racom Corp.*, 323 F.3d 620, 624 (8th Cir. 2003). Further, district courts are given great deference in determining the propriety of sanctions due to their residence on "the front lines of litigation", a position which affords a unique and apt vantage point from which to make such determinations. *MHC,* 323 F.3d at 624. The Eighth Circuit has stated that the standard for imposing sanctions under Rule 11 is "whether the attorney's conduct 'viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.'" *Perkins v. General Motors Corp.*, 911 F.2d 22, 36 (8th Cir. 1990) (quoting *Braley v. Campbell,* 832 F.2d 1504, 1512 (10th Cir. 1987)). "The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and, in most situations is the person to be sanctioned for a violation." Fed. R. Civ. P. 11, Advisory

Committee Note to 1993 Amendments, Subdivisions (b) and (c).

This Court, in its order to show cause, directed Mr. Buchanan to account for the many iniquities contained in Document 373, which he had signed and presented to this Court for consideration. The Court found several violations of the Local Rules and the Federal Rules of Civil Procedure which were outlined in its order granting summary judgment in favor of the defendants (Doc. 506) and cross-referenced in the order to show cause. In concluding that Document 373 was dilatory, mendacious, overly burdensome, and unprofessional, this Court set forth six examples of misstatements and mischaracterizations in an attempt to demonstrate the fundamental shortcomings of the extremely lengthy document. Rather than accounting for the greater issues raised by the Court, Mr. Buchanan's response has merely attempted to explain away the examples cited by the Court as regrettable and unintended mistakes.

It appears that Mr. Buchanan believes that the six examples cited by the Court comprise an exclusive list of the items identified specifically enough to be sanctionable. In fact, he has requested that the Court list with specificity the other items on which the Court intends to base sanctions so that he might have the opportunity to respond with explanation to each and every item. Implied in this request is the position that this Court may only base its sanctions upon the six instances specifically enumerated. Those items, however, were clearly set forth to exemplify similar conduct that occurred throughout the extremely large document on occasions far too numerous to list. The clear intention of this Court in offering those six examples was to provide an outline of the objectionable

conduct contained in Document 373 as a whole and not to supply an exclusive list of sanctionable actions. (Doc. 506 at pp. 3, 5).

The Court is confident in basing the imposition of Rule 11 sanctions upon the whole of Document 373, as illustrated in the order granting summary judgment and referenced in the order to show cause. While *sua sponte* sanctions require that notice be given of the specific conduct that appears to violate Rule 11, this requirement does not place upon the Court the burden of listing each and every transgression contained within 480 pages of Document 373. Indeed, as the Eighth Circuit has upheld the imposition of sanctions based upon the full record of a case, the notice provided by the Court in the order on summary judgment and the order show cause with regard to Document 373 is more than sufficient to satisfy the preference of this jurisdiction that fair notice for the imposition of Rule 11 sanctions be provided by the identification of a specific pleading or document. *See Lupo v. R. Rowland and Co.,* 857 F.2d 482, 485 (8th Cir. 1988). The conduct specified as the basis for sanctions was indeed the very nature and tenor of the Document 373 as a whole, which, as stated earlier, was found by this Court to be mendacious, dilatory, and unprofessional.

Additionally, Mr. Buchanan has asserted that his briefs excessive length was not a specified basis for Rule 11 sanction. (Doc. 518 at p. 9 note 8). Notwithstanding Mr. Buchanan's contention, the length of the document not only played a major role in this Court's decision to enter the order to show cause, but was also specifically enumerated as a significant iniquity of Document 373. In fact, in its order granting summary judgment in favor of the defendants on the claims of Doyle Clark, which was

incorporated by cross-reference into the order to show cause, this Court concluded that many portions of that document, including numerous attempts to controvert the Plaintiffs' sworn deposition testimony, "were created for the sole purpose of causing unnecessary delay and a needless increase in the cost of litigation." (Doc. 506 at p. 6).

While this Court in no way contends that length alone is a sufficient basis for sanctions under Rule 11, the length of the document, 480 pages and 948 paragraphs of Fact Statement, when coupled with numerous misstatements and mischaracterizations of the record becomes unduly burdensome. The tactics employed in Document 373 rely upon neither the trustworthiness of the factual assertions nor the quality of the arguments, but upon the sheer volume of material impressed upon the opposing parties and the Court. It is the opinion of this Court that Document 373 represents a form litigation by attrition, wherein the practitioner's intent was to force the opposition either to yield to its position or be crushed under a great weight of misstated factual assertions and drowned in a sea of bombast. Consequently, the oppressive size combined with the overall untrustworthy nature of the document had a cumulative effect which this Court found to be "repugnant to the very concept of judicial economy." (Doc. 506 at p. 2).

When placed in this context, Mr. Buchanan's attempt to pass over the issue of length is extremely disingenuous considering that the majority of the Defendants' briefing was in direct response to the monstrous proportions of Document 373. Indeed, some of the apologetics contained in the response to the order to show cause (Doc. 518) and the oppositions to the defendants' motions for attorney's fees (Docs. 525 and 531) attempt to justify the length of

Document 373 by comparing it to the combined length of the Defendants' briefing. This ill-conceived argument completely ignores the fact that the majority of the briefing by UPS and Local 41 on their motions for summary judgment was engendered by the impropriety of Document 373. Mr. Buchanon asserts that while his brief "was long (480 pages) . . . defendants' summary judgment motions and replies were longer (837 pages, including 577 fact contentions)." (Doc. 525 p. 1). The Court finds this comparison to be irrelevant considering that, of the roughly 850 pages constituting the defendants combined briefing on summary judgment (Docs. 312, 320, 321, 426, and 429), almost 600 pages were devoted to responding to Document 373.

After reviewing the record and the memorandum in response to the order to show cause, this Court concludes that Mr. Buchanan violated Rule 11 of the Federal Rules of Civil Procedure by egregiously misstating and mischaracterizing the record on numerous occasions in Document 373. Additionally, portions of that document have been found by this Court to have been created for the sole purpose of causing unnecessary delay and a needless increase in the cost of litigation. As such, pursuant to Rule 11, this Court finds that sanctions are appropriate as penalty and in order to deter future repetitive conduct. In considering an appropriate amount of Rule 11 sanctions the Court takes into consideration the award of attorneys' fees pursuant to 28 U.S.C. §1927 assessed against Thomas R. Buchanan in Document 535.

Accordingly, it is hereby ORDERED that Thomas R. Buchanan pay into the Court as a penalty for his conduct the amount of $1,000.00.

IT IS SO ORDERED.

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States District Court

DATED: July 19, 2005

2005 WL 1688071

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

STEPHEN E. JONES and DOYLE CLARK,	
Plaintiffs,	
vs.	
UNITED PARCEL SERVICE, INC., and LOCAL 41 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	**Case No. 03-0284-CV-W-GAF**
Defendants.	

ORDER

(Filed 07/19/2005)

Presently before this Court are motions (Docs. 513 and 523) for reimbursement of attorneys' fees from Thomas R. Buchanan, counsel for Plaintiffs, pursuant to 28 U.S.C. § 1927 submitted by Defendant United Parcel Service, Inc. ("UPS") and Local 41 of the International Brotherhood of Teamsters ("Local 41") (collectively as "Defendants"). Defendants claim that they were required to incur excess attorneys' fees in the course of responding to Plaintiffs' Memoranda in Opposition to Defendants' Motions for Summary Judgment (Doc. 373). Mr. Buchanan has opposed this motion. This Court, on its own motion, has already found Document 373 to be violative of Rule 11 of the Federal Rules of Civil Procedure and sanctioned Mr. Buchanan accordingly. For the following reasons, Defendants' motions for attorneys' fees are GRANTED.

Section 1927 of Title 28 provides that an attorney who "multiplies the proceedings in any case unreasonably and vexatiously" may be sanctioned by being "required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Eighth Circuit courts interpreting 28 U.S.C. § 1927 have held that sanctions thereunder may be imposed "when attorney conduct, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Lee v. First Lenders Insurance Services, Inc.*, 236 F.2d 443 (8th Cir. 2001) *quoting Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 719 (8th Cir. 1999). "If the attorney conducts the litigation in such a manner that unnecessarily and vexatiously escalates costs, sanctions may be imposed under section 1927." *Lupo v. Rowland and Co.*, 857 F.2d 482, 486 (8th Cir. 1988).

Mr. Buchanan contends that the Defendants have not met the standard required for Section 1927 sanctions, which he asserts contains both objective and subjective components. This Court disagrees. While, in this jurisdiction, the question of whether Section 1927 contains only an objective component arguably remains an open issue, the standard for sanctions under Section 1927 has long been articulated as "when attorney conduct, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *First Lenders,* 236 F.2d at 445. Based upon the iniquities present in Document 373 as detailed in the order on summary judgment, the order to show cause, and the order imposing Rule 11 sanctions (Docs. 506, 508, and 534), this Court can only conclude that Mr. Buchanan's conduct is sanctionable pursuant to Section 1927 under both the objective standard that has been articulated by the Eighth Circuit and

the more stringent subjective standard which Mr. Buchanan now urges the Court to apply.

First, this Court finds that the conduct exhibited in Document 373 clearly satisfies the objective standard set forth by the Eighth Circuit. In its various orders detailing the shortcomings of Document 373, this Court commented in detail concerning not only the oppressive size of the suggestions, which spanned a monumental 480 pages, but also recounted the general untrustworthy nature of the document. (Docs. 506, 508, and 534). Additionally, certain portions were set forth in a manner which this Court found to be completely inconsistent with and violative of the Local Rules and the Federal Rules of Civil Procedure. (Doc. 506). Mr. Buchanan's conduct with regard to Document 373, at the very least, constitutes a reckless disregard for his duty to conduct himself in a manner that promotes the just, speedy, and inexpensive determination of the case at issue. Further, as set forth in the order imposing sanctions under Rule 11, certain portions of Document 373 were, in the opinion of this Court, fashioned intentionally to delay the proceedings and, by their sheer size and mendacious nature, to inhibit meaningful response by opposing counsel. As such, this Court concludes that Mr. Buchanan's conduct satisfies the objective requirement of Section 1927.

Second, this Court remains unconvinced of Mr. Buchanan's contention that the Section 1927 standard in this jurisdiction contains a subjective requirement. By his own admission, the case law regarding this issue in the Eighth Circuit is unclear. *See* Doc. 525, (citing *Schaffhausen v. Bank of America,* 2004 WL 234400, *1 (D. Minn. Feb. 2, 2004)). This jurisdiction has indicated that the language of Section 1927 "appears to require both a finding of

objectively unreasonable behavior and a finding of bad faith." *NAACP v. Atkins,* 908 F.2d 336, 340 (8th Cir. 1990). Beyond this cursory notation, however, the Eighth Circuit has forgone explicitly holding such sanctions to require a finding of subjective bad faith. Indeed, in subsequent decisions regarding the standard for the imposition of Section 1927 sanctions, the Eighth Circuit has always articulated the standard as requiring the attorney's conduct be "viewed objectively" in order to determine whether it manifests "either intentional or reckless disregard of the attorney's duties to the court." *Perkins v. Spivey,* 911 F.2d 22, 36 (8th Cir. 1990); *First Lenders,* 236 F.2d at 445; *L.B. Sales, Inc.,* 177 F.3d at 718. As stated above, Mr. Buchanan's behavior was a sound display of reckless behavior with regard to the Local Rules and the Federal Rules of Civil Procedure. Furthermore, it is the opinion of this Court that Mr. Buchanan's intent in opposing summary judgment with Document 373 was not to defend the case on the merits, but to survive summary judgment by inundating the parties and the Court with pages upon pages of information that was largely irrelevant and inadmissible.

Notwithstanding Mr. Buchanan's contentions, this Court can only conclude based on its earlier findings that the conduct exhibited in this case would easily satisfy a subjective, bad-faith component if Section 1927 were to require such a finding. As detailed in the order imposing sanctions under Rule 11 as well as the order on summary judgement with regard to Plaintiff Clark's claims, this Court has found that portions of this document "were created for the sole purpose of causing unnecessary delay and a needless increase in the cost of litigation." (Docs. 506 at p. 6 and 534 at p. 5). Accordingly, this Court finds that

those very same portions of Document 373 unreasonably and vexatiously multiplied the proceedings in this case in violation of Section 1927.

With regard to the amount of fees recoverable pursuant to Section 1927, the Court has discretion in isolating the expenses reasonably incurred by the parties as a result of the improper conduct. *Tenkku v. Normandy Bank,* 348 F.3d 737, 744 (8th Cir. 2003). Moreover, this is not an exercise that requires great precision. *Id.* Again, the award of attorneys' fees under Section 1927 is within the discretion of the Court. *First Lenders,* 236 F.3d at 445.

In its motion, UPS contends that it incurred $190,092.00 in fees in responding to Document 373. That amount is derived from the 1,043 hours billed by its attorneys multiplied by the various rates of the attorneys that worked on the response, which range from $150.00 to $285.00 per hour. UPS contends that one fourth of that total amount is attributable to the objectionable and inappropriate portions of Plaintiffs' briefing and requests that a total of $47,523.00 in attorneys' fees be reimbursed. In contrast to the team of attorneys employed by UPS, Local 41 employed the services of only one attorney, G. Gordon Atcheson, in preparing its response to Document 373. According to Local 41, Mr. Atcheson spent a total of 173 hours on the response at an hourly rate of $140 per hour. Thus, the total amount billed to Local 41 for the response to Document 373 was $24,220.00. Of that amount, Local 41 estimates that 65 percent of the legal fees can be attributed to Mr. Buchanan's improper conduct and asks that fees be reimbursed in an amount of $15,400.00.

While UPS and Local 41 should receive some compensation for having to respond to portions of a filing that have been deemed to be improper and unreasonable, the Court finds that the amount requested does not reflect a true assessment of the costs incurred due to Mr. Buchanan's inappropriate conduct. For instance, UPS has included in its submission for reimbursement of attorneys' fees the time that it was billed for the preparation of seven motions to strike improper declarations submitted with Plaintiffs' opposition to summary judgment. (Exhibit A to Doc. 524 at ¶ 11). While no doubt engendered by the filing of Document 373, this Court considers these motions to strike to be outside the scope of fees which Section 1927 contemplates as reasonably incurred. Additionally, while Local 41's estimate is more in line with what this Court would conclude to be fees reasonably incurred due to the impropriety of Document 373, it is the opinion of this Court that the percentage tendered by Local 41 (65%) is excessive. As a result, in its discretion, this Court finds that the amount of $10,000.00 per defendant, which is roughly 41% of the $24,220.00 that Local 41 has represented that it incurred and which this Court considers to be a more sensible estimate of fees reasonably incurred by the Defendants due to Mr. Buchanan's improper conduct with regard to Document 373.

Having concluded that Mr. Buchanan unreasonably and vexatiously multiplied these proceedings by filing Document 373 in the manner in which it was filed, this Court finds that he is subject to sanctions requiring him to reimburse excess costs, expenses, and attorneys' fees to the Defendants pursuant to 28 U.S.C. § 1927. Accordingly, based upon a review the arguments submitted by the parties on this matter as well as this Court's familiarity

with the document that is the subject of these sanctions it is hereby ORDERED that Thomas R. Buchanan reimburse UPS and Local 41 the amount of $10,000.00 each for reasonable attorneys' fees incurred due to the vexatious, unreasonable, and improper filing of Document 373.

IT IS SO ORDERED.

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States District Court

DATED: July 19, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

STEPHEN E. JONES and DOYLE CLARK,	)	
Plaintiffs,	)	
vs.	)	**Case No. 03-0284-CV-W-GAF**
UNITED PARCEL SERVICE, INC.,	)	
Defendant.	)	

ORDER TO SHOW CAUSE

In its order granting summary judgment in favor of Defendants (Doc. 506) this Court found that certain portions of Plaintiffs' Memoranda in Opposition to Defendants' Motions for Summary Judgment (Doc. 373), namely the Statement of Controverted Fact ("Fact Statement")and Responses to Defendants' Statements of Uncontroverted Fact ("Responses"), to be noncompliant with both the Local Rules of this Court and the Federal Rules of Civil Procedure. In doing so, the Court offered multiple examples of egregious misstatements and misrepresentations in a vain attempt to capture the mendacious and dilatory nature of this most burdensome and supremely unprofessional document. The Court found not only that Fact Statement and Responses were severely noncompliant with the Federal Rules of Civil Procedure and the Local Rules of this Court, but also that many of the allegations contained therein were wholly unsupported by any competent, relevant, or admissible evidence.

Rule 11 of the Federal Rules of Civil Procedure requires that by making a representation to the Court in the form of a "pleading, written motion, or other paper" an attorney is certifying that "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Fed. R. Civ. P. 11(b)(3). The Rule further states that denials of factual contentions must be "warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief" Fed. R. Civ. P. 11(b)(4).

As a result, Thomas R. Buchanan, as counsel for Plaintiffs and author of Doc. 373, is hereby ordered to show cause within fifteen (15) days as to why this Court should not impose sanctions as a penalty for the numerous and atrocious violations of Rule 11 of the Federal Rules of Civil Procedure. The response to this order to show cause is not to exceed more than 10 pages of double-spaced type.

IT IS SO ORDERED.

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States District Court

DATED: April 7, 2005

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-3215

Thomas Buchanan, Appellant, v. United Parcel Service, et al., Appellees.	* * * * * * *	Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

November 9, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Federal Rule of Civil Procedure 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a

reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party

to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

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28 U.S.C. § 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

FILED
MAR 2 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 06-1113

In The

Supreme Court of the United States

Thomas R. Buchanan,
Petitioner,

v.

United Parcel Service, Inc. and
International Brotherhood of Teamsters, Local 41,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF OF TEAMSTERS LOCAL 41 IN OPPOSITION

G. Gordon Atcheson
Counsel of Record
The Atcheson Law Office
4800 Rainbow Blvd.
Suite 6
Westwood, Kansas 66205
(913) 362-8650

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Statement of the Case

1. Thomas R. Buchanan, a lawyer practicing in Kansas City, has asked this Court to grant a writ of certiorari to consider sanctions imposed on him for violating rules governing summary judgment practice when he submitted a 480-page opposition memorandum containing repeated misstatements of the record evidence, factual assertions without bases in that record, and extended argument in portions of the document reserved for recitation of facts. Pet. App. 9. The opposition substantially retarded the summary judgment process thereby warranting sanctions.

Mr. Buchanan filed the offending document on behalf of Stephen E. Jones and Doyle Clark as plaintiffs in a hybird § 301/DFR action they brought against their employer United Parcel Service and their union International Brotherhood of Teamsters, Local 41 in the United States District Court for the Western District of Missouri. After affording Mr. Buchanan notice and an opportunity to respond, pet. app. 27-28, the trial judge sanctioned him $1,000.00 for violation of Fed.R.Civ.P. 11, pet. app. 19. UPS and Local 41 also filed motions for relief under 28 U.S.C. § 1927 on the grounds that Mr. Buchanan's filing of the opposition memorandum "multiplie[d] the proceedings" causing them to incur excessive attorney fees. The trial judge granted those motions and awarded each of them $10,000.00. Pet. App. 26. Mr. Buchanan appealed all of the sanctions, and the United Stated Court of Appeals for the Eighth Circuit affirmed. Pet. App. 1-11.

Mr. Buchanan argues here that he was not given adequate notice of the conduct for which he was being sanctioned, questions 1 and 2, and that the lower courts' rulings failed to sufficiently identify the bases for the sanctions, question 3. The record is otherwise. The trial judge specifically pointed to the portions of the summary judgment opposition

dealing with the facts of the underlying case as being grossly defective and provided specific examples. Pet. App. 27-28.[1] Likewise, the motions for relief under § 1927 defined the problems with the briefing and offered numerous examples. In their rulings, the trial judge and the court of appeals more than adequately defined the violations of Rule 11 and § 1927. Mr. Buchanan was afforded due process in all respects and at all levels.

Mr. Buchanan also argues that sanctions imposed under § 1927 require a finding of subjective bad faith and suggests a circuit-split on this point, question 4. Settled law, however, does not support that contention in either respect. As discussed below, the Ninth Circuit's standard for sanctions under § 1927 is functionally the same as the one the Eighth Circuit applied here. *See Tenkku v. Normandy Bank*, 348 F.3d 737, 743 (8th Cir. 2003) (sanctions may be imposed under § 1927 for conduct that, "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.") (internal quote omitted); *Fink v. Gomez*, 239 F.3d 989, 993 (9th Cir. 2001) ("[R]ecklessness suffices for § 1927, but bad faith is required for sanctions under the court's inherent power."). Neither court of appeals requires a finding of bad faith.

In sum, the petition presents neither an issue of remarkable importance to the legal community nor a bona fide division among the circuits on a substantial point of federal

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1/The trial judge's show cause order incorporates his detailed discussion of the deficiencies of the opposition papers appearing in his rulings on summary judgment. Mr. Buchanan has not included those rulings in the appendix. But Messrs. Jones and Clark have filed a separate petition for writ of certiorari on the judgment entered against them in the underlying case. *Jones and Clark v. United Parcel Service, et al.*, Case No. 06-1099. The ruling appears in the appendix to Jones and Clark's petition. App. 30-79. The trial judge's discussion of the failings of the opposition memorandum appears at app. 31-37.

law.

2. In the underlying action, Jones and Clark argued that they had been wrongfully terminated from their jobs with UPS and that Local 41 failed to adequately represent them in the grievance process provided in the collective bargaining agreement between the union and company. This is commonly known as a hybrid § 301/DFR action.[2] *See generally, Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71(1976); *Vaca v. Sipes*, 386 U.S. 171, 190-95 (1967) (recognizing and discussing hybrid claims). Jones and Clark brought a variety of discrimination claims against UPS alone. The record established that Local 41 pursued grievances challenging the terminations through every available step of the process provided in the CBA, presented evidence on behalf of Jones and Clark, and allowed each of them speak at length in their own defense at the grievance hearings. Despite that evidence, including transcripts of the final grievances hearings, Jones and Clark claimed they were inadequately represented because of intra-Local politics. The trial judge granted summary judgment to Local 41 and UPS. The court of appeals affirmed.

In response to the summary judgment motions and supporting memorandums, Mr. Buchanan crafted a book-length opposition that ignored or mischaracterized the factual record and freely mixed argument and presentation of the purported facts. The offending character of the opposition is difficult to capture in the abstract. Its offensive quality

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2/Breach of a labor contract gives rise to a violation of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. And a union's legally inadequate handling of a member's grievance violates the judicially imposed "duty of fair representation." Hence, a union member's cause of action requiring proof of both has become known as a § 301/DFR claim.

gives credence to the adage that seeing is believing. Both the trial judge and the court of appeals had that opportunity and were united in the conclusion that the document could not be reconciled with the governing court rules or a lawyer's duty to the tribunal.

The opposition memorandum began with 168 pages of additional "facts" to be considered on summary judgment presented in 948 paragraphs. The memorandum then took 179 pages to respond to the fact statements in the Defendants' summary judgment papers. And the document concluded with 132 pages of argument. Pet. App. 2-3. But the offending character of the opposition lay not so much in its length as its failure to conform to either the accepted rules for summary judgment papers or the factual record of the case. The court of appeals described the opposition as studded with "unsupported attempts to controvert facts (including misstatements and mischaracterizations of the record), failures to provide citations to the record, improper use of cross-references, and inappropriate inclusion of legal argument in a purported listing of undisputed facts[.]" Pet. App. 9. To be sure, the problems the opposition created escalated measurably because of its length – the deficiencies instead of being confined to a document of 10 or 20 pages - were spread across nearly 350 pages. Id.

3. In his decision granting summary judgment on Clark's claims, the trial judge provided a detailed description of the failings of the opposition. *See Jones and Clark v. United Parcel Service, et al.*, Case No. 06-1099, pet. app. 31-37. The trial judge cited half a dozen examples of the problems that plagued the entire opposition and clearly explained they were illustrative rather than exhaustive. Id. at 34 ("[T]he Plaintiffs' 948 paragraph Fact Statement contains numerous and egregious misrepresentations and misstatements. In an effort to illustrate the appalling nature of these representations, the Court offers some examples."), id. at 35

("[T]he occurrences are far too numerous to list here[,] and, therefore, the Court will be forced to offer examples to demonstrate these violations.")

The trial judge, simultaneous with the entry of summary judgment for the Defendants, issued an order to Mr. Buchanan to show cause why he should not be sanctioned under Rule 11 for the defects in the opposition papers. Pet. App. 27-28. The trial judge directed the response be filed within 15 days and be limited to 10 pages. Id. The trial judge acted on his own initiative rather than in response to a motion from either UPS or Local 41. Mr. Buchanan responded to the show-cause order by discussing in detail the *examples* the trial court offered, but never really offered an explanation for the overall character of the briefing. Mr. Buchanan omits his response from the appendix to this Court. The trial judge imposed a $1,000.00 sanction on Mr. Buchanan and in doing so again outlined the overall problems with the opposition memorandum. Pet. App. 12-19. The sanctions were intended as a penalty to deter repetition of the offending conduct.[3]

Following the entry of the show-cause order, UPS and Local 41 both filed motions under § 1927 to recover excessive attorney's fees they incurred in preparing reply briefs to the summary judgment opposition because of its deficient character. In those papers, the Defendants outlined additional examples of the problems with the opposition. Mr. Buchanan filed responses to those motions. Pet. App. 20-21(order referring to the motions and response). The trial judge granted those motions in part; he found Mr. Buchanan liable under § 1927, but awarded sums less than UPS and Local 41 had requested. Pet. App. 24-26. Each

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3/In conformity with Rule 11, Mr. Buchanan was directed to pay the sanction to the Clerk of the Court.

defendant was awarded $10,000. Pet. App. 26.

Mr. Buchanan appealed the Rule 11 sanctions and the awards under § 1927. The court of appeals affirmed the trial judge's decisions in their entirety. Pet. App. 1-11.

Both courts readily (and understandably) found the opposition to be in violation of Rule 56.1 of the Local Rules for the U.S. District Court for the Western District of Missouri. Pet. App. 2; *Jones and Clark*, pet. app. 37. The local rule, *Jones and Clark*, pet. app. 139-40, requires facts presented on summary judgment to set forth concisely with specific references to the supporting evidentiary record. And any opposition to the facts must likewise be succinctly stated and referenced in the evidence. The opposition also ignored the spirit, if not the letter, of Fed.R.Civ.P. 56, which requires the evidence offered be of the type that would be admissible at trial. Thus, statements without foundation in the record cannot establish a basis for granting or denying summary judgment.

Argument

1. This Case Fails to Meet the Criteria for Review. Review on certiorari and the concomitant investment of this Court's time and resources must be reserved for the truly exceptional case presenting an issue of such significance that it transcends the legal relationship of the parties and would, upon resolution here, recast the governing body of law. Generally, that sort of issue derives from a split among the circuit courts on a significant point of law or from a question of such great import that it will affect a broad spectrum of the citizenry. *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) ("Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of ap-

peal.'") (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). *See, e.g., Hartman v. Moore*, ___ U.S. ___, 126 S.Ct. 1695, 1701 (2006) (certiorari granted to resolve circuit split); *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (certiorari granted to answer important question of law); *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (important question of law).

Mr. Buchanan's petition presents neither a legitimate circuit split nor an issue of marked importance. Three question presented in the petition all revolve around nebulous due process claims arising from the supposed lack of specificity in the trial judge's orders and the court of appeals' affirmance. The final question, as noted, rests on an insupportable claim of a circuit-split on the standards for imposing awards under § 1927.

2. The Lower Court Proceedings Afforded Mr. Buchanan Due Process. Mr. Buchanan suggests he was deprived of adequate notice as to his offending conduct in submitting the summary judgment opposition despite the trial judge's description of the deficiencies in light of the governing court rules and the illustrative examples culled from the 480-page brief. The rulings, however, more than adequately outlined the nature of the court's concern. Rather than address the reason for the essential failure of the opposition, Mr. Buchanan sought to acquit himself by trying to explain away the individual examples cited in the rulings. But, of course, that missed the fundamental point. In turn, Mr. Buchanan never explained why he filed an opposition that repeatedly failed to comport with the basic requirements for citing to record evidence and doing so accurately. And he has yet to do so – no such explanation appears in his petition.

Due process, in the constitutional sense, is an extraordi-

narily malleable concept intended to provide fair notice under the circumstances before a party can be deprived of a protectable interest. *See generally, Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 312 (1992) ("'notice' or 'fair warning'" often referred to as "the analytical touchstone of due process"); *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950) (due process satisfied through notice "reasonably calculated, under all the circumstances to apprise interested parties" of the contemplated action). This Court has described the protection this way: "Procedural due process imposes constraints on government decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

In this case, the Local Rule combined with the trial judge's description of the defects in the summary judgment opposition afforded Mr. Buchanan with adequate notice of the contemplated basis for the proposed Rule 11 sanctions. And the motions of UPS and Local 41 for relief under § 1927 similarly informed him of the basis for those requests.

Mr. Buchanan implicitly would require a court sanctioning under Rule 11 or a party seeking a § 1927 award to list each and every individual defect in an offending document in a show-cause order or motion. That is not required. What is required is fair notice – a sufficient description of the alleged problems to permit a response. Mr. Buchanan received that notification. Moreover, he could review the opposition to refresh is recollection as to which factual assertions were not cited to the record and which were inaccurately cited. He could, upon reviewing the document, also readily identify the extended legal arguments injected into the portions of the brief that were supposed to be confined to factual representations. Contrary to Mr. Buchanan's refrain, he was not required to respond to "an

invisible and moving target." Pet. 9, 11. At 480 pages, his opposition was hardly invisible and it did not change any once it was filed.[4] Mr. Buchanan was not left to guess about what the trial court viewed as the rules violations. He chose to avoid addressing the overarching problem with the opposition – perhaps because there is no legitimate explanation for so deviant a brief – in preference to discussing only the cited examples of that problem.

In addition, the Buchanan approach would, if accepted, build in a certain perverse burden on a court considering sanctions. Descriptive identification of the defects would be insufficient. Rather, the court would have to go through the document line by line and list every instance that a rule had been violated. The more noncompliant a brief, the greater the burden on the trial judge to issue a proper show-cause order under the Buchanan doctrine.

Due process, however, does not require that sort of micro-notification to give a party fair warning. *See, e.g., United States v. Lanier*, 520 U.S. 259, 266 (1997) (In the criminal context, fair warning requires that a person need not "guess" about the prohibited conduct.). Mr. Buchanan was sufficiently informed of the defects in the briefing. The cases Mr. Buchanan cites do not require more than the notice he received here. Essentially, they preclude a court from sanctioning a lawyer without any notice or for conduct not

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4/A wag might also point out that if the target truly were invisible, Mr. Buchanan would have no way of knowing whether it was moving or not. This sort of rhetorical illogic cannot gloss over the fundamental flaw in Mr. Buchanan's position. The defects in his opposition were patent – missing and inaccurate cites are apparent, as is the (improper) interspersing of argument with fact statements.

embraced in the show-cause order.[5] Pet. 10. Here the show-cause order described the improper conduct, and the trial judge imposed the sanctions for that conduct – nothing more and nothing less. The "specific conduct" language of Rule 11(c)(1)(B) is not otherwise. It prohibits sanctions for generically described litigation abuses that fail to identify particular conduct or a particular submission.

Mr. Buchanan further complains that his response to the trial judge's show-cause order was limited to ten pages, depriving him of an opportunity to be heard. But Mr. Buchanan fails to demonstrate how that unfairly deprived

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5/ In *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 389 (2d Cir. 2003), the court of appeals reversed sanctions imposed when the notice referred to deficiencies in the defendant's answer, but the sanctions order relied upon a letter never mentioned in the answer. The other grounds largely entailed sanctions for legal arguments that could have been viewed as seeking changes in existing law – a nonfrivolous position. Here, of course, the notice and the sanctions focused on those portions of the summary judgment opposition addressing the facts of the case. In *Martens v. Thomann*, 273 F.3d 159, 178-79 (2d Cir. 2001), the court of appeals found a complete lack of notice to counsel regarding possible sanctions and suggested in dicta that adequate notice could include reference to allegedly unsupported assertions in the pleadings. Similarly, the court of appeals reversed Rule 11 sanctions in *Hutchinson v. Pfeil*, 208 F.3d 1180, 1184 (10th Cir. 2000), because the trial judge failed to issue a show cause order before acting. The appellate court did not discuss what might constitute specific notice in any given circumstance. In *Thornton v. General Motors Corp.*, 136 F.3d 450, 454 (5th Cir. 1998), the court of appeals reversed Rule 11 sanctions because the show-cause order the trial judge issued following summary judgment briefing appeared to question the evidence submitted in opposition to the motion, but counsel was ultimately sanctioned for failing to conduct an adequate investigation before filing suit – something not mentioned in the show-cause order. Finally, *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147, 151 (7th Cir. 1996), simply stands for the unremarkable proposition that notice and an opportunity to be heard *after* Rule 11 sanctions have been imposed fails to comport with the required procedural process.

him of the chance to respond. First, he does not suggest here what else he would have said to the trial judge. Nor did he make such a proffer to the court of appeals. Second, Mr. Buchanan's response to the § 1927 motions was not so limited. The trial judge plainly considered the Rule 11 sanctions and the § 1927 awards in tandem. The orders were entered the same day. Pet. App. 19, 26. And the trial judge specifically refers to the § 1927 awards as a factor shaping the size of the monetary penalty he imposed under Rule 11. Pet. App. 18. The trial judge reviewed the entire briefing in reaching his conclusions, not just the 10 pages Mr. Buchanan submitted in response to the show cause order. Even if there were due process implications to the page limitation on the Rule 11 response (though there actually are not), Mr. Buchanan suffered no prejudice because the whole of his rejoinder to the § 1927 motions was before the court, as well.

Finally, on the due process front, Mr. Buchanan contends neither the trial judge nor the court of appeals described with sufficient particularity the bases for their rulings on the sanctions. The purported lack of specificity by Mr. Buchanan's reckoning deprives him of meaningful judicial review and, thus, due process. He cites no authority to support his supposition.

The trial judge's Rule 11 order describes the problems with the summary judgment opposition with sufficient clarity to allow appellate review. Pet. App. 15-16. The court of appeals indicated no difficulty in reviewing the trial judge's decisions on the sanctions or the § 1927 motions for want of a description of the deficiencies and indicated no desire for more detailed findings. The court of appeals is hardly reticent to point out shortcomings in a trial judge's findings. *See, e.g., Darst v. Webbe Tenant Ass'n Bd. v. St. Louis Housing Authority*, 339 F.3d 702, 712 (8th Cir. 2003); *Collins v. Henderson*, 180 F.3d 988, 990 (8th Cir. 1999).

The court of appeals also had the summary judgment opposition along with the supporting evidentiary materials before it in the record on appeal. The court of appeals, therefore, could assure itself of the character of the opposition by reviewing the record. And in his appellate brief, Mr. Buchanan was free to offer whatever explanation he deemed appropriate about the reasons the summary judgment opposition turned out the way it did.

3. There is No Circuit-Split on the Standard for § 1927 Relief. In his final issue, Mr. Buchanan contends the Ninth Circuit requires subjective bad faith on the part of counsel to warrant an award of fees under § 1927. Pet. 16. He cites *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983), for this proposition. But that case does not so hold, and the Ninth Circuit has since specifically recognized that an award under § 1927 requires only objectively reckless conduct. *Fink*, 239 F.3d at 993.

In *Blodgett*, the court of appeals stated that § 1927 requires a finding that "counsel acted 'recklessly or in bad faith[.]'" *Blodgett*, 709 F.2d at 610 (quoting *Barnd v. City of Tacoma*, 664 F.2d 1339, 1343 (9th Cir. 1982)). The court of appeals recognized that either reckless conduct or conduct undertaken in bad faith would justify an award. The opinion, thus, noted two sufficient conditions, but did not explicitly define the minimally necessary condition. The court of appeals reemphasized the sufficiency of reckless conduct in *Fink*, 239 F.3d at 993, stating: "[R]ecklessness suffices for § 1927[.]" In *Fink*, the court of appeals sought to eliminate some ambiguity that had crept into circuit precedent on the question and, thus, spoke with care and deliberation.

The Eighth Circuit similarly holds that reckless conduct will support an award under § 1927. *Tenkku*, 348 F.3d at 743; *Perkins v. Spivey*, 911 F.2d 22, 36 (8th Cir. 1990) ("The

standard under § 1927 . . . is whether the attorney's conduct 'viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.'") (quoting *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc)). Mr. Buchanan attempts to suggest otherwise in his petition. His reliance on *NAACP v. Atkins*, 908 F.2d 336, 340 (8th Cir. 1990), is misplaced. The *Atkins* panel suggested that § 1927 might include a "bad faith" component, but the facts of the case did not require resolution of that issue. In that case, the court of appeals held that the trial judge did not abuse his discretion in finding the lawyer's actions to have been objectively reasonable, rendering an award under § 1927 inappropriate. The court of appeals specifically noted that, as a result, it did not need to make any further inquiry, i.e., determining whether subjective bad faith was a necessary condition for an award.[6]

The Eighth Circuit, however, has since directly addressed the standards for imposing awards under § 1927 in *Tenkku*, *Perkins*, and other cases and has held that reckless conduct is enough. In sum, Mr. Buchanan fails to demonstrate any substantial disagreement among the circuits on this point.

The settled law recognizes that recklessness is sufficient to satisfy Rule 11. *See, e.g., Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33, 40 (1st Cir. 2005); *Norsyn, Inc. v. Desai*, 351 F.3d 825, 831 (8th Cir. 2003); *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 153 (4th Cir. 2002) ("standard of objective reasonableness" governs Rule 11

6/The *Atkins* Court relied on a footnote in an earlier case for the notion that § 1927 might require a showing of bad faith. *Atkins*, 908 F.2d at 340. But the prior case also made only passing reference to that possibility and specifically withheld any ruling on the point. *O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 395 n.2 (8th Cir. 1987) ("Whether [§ 1927] requires a finding of bad faith is a question that is not before us.").

sanctions). To employ a "bad faith" requirement for § 1927 sanctions would create differing standards for Rule 11 and § 1927, even though the two provisions operate in a complementary manner to fully redress sanctionable attorney conduct. When a court acts on its own motion in response to a lawyer's conduct, it may not award attorney's fees to the opposing party under Rule 11. *Norsyn*, 351 F.3d at 831. The court, however, may impose an economic penalty, in the form of a dollar amount paid to the clerk, combined with nonfinancial conditions designed to prevent repeat conduct, such as requiring the offending lawyer to attend legal education seminars. Rule 11, thus, is a forward-looking measure aimed at affecting future behavior. In contrast, § 1927 is designed to remedy the financial impact of the improper conduct on the other parties to the action by allowing them to recover from the offending lawyer an amount equal to the excess legal fees they were required to pay their own lawyers because of that conduct. Thus, § 1927 essentially looks back to ameliorate a financial harm. Together, Rule 11 and § 1927 provide a complete remedy that both seeks to prevent future harm and corrects for past harm. Accordingly, they logically should be governed by substantially the same objective standard.

Conclusion

The petition for writ of certiorari should be denied for want of a question of substantial importance or a genuine division among the circuit courts of appeal.

Respectfully submitted,

G. Gordon Atcheson
The Atcheson Law Office
4800 Rainbow Blvd., Suite 6
Westwood, KS 66205
(913) 362-8650

Counsel for Respondent
International Brotherhood
of Teamsters, Local 41